COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2020-P-0263

COMMONWEALTH

v.

TONY A. TINSELY (A/K/A TONY A. TINSLEY)

BRIEF AND RECORD APPENDIX OF THE COMMONWEALTH, APPELLANT

ON APPEAL FROM AN ORDER OF THE BERKSHIRE SUPERIOR COURT

ANDREA HARRINGTON
Berkshire District Attorney

STEVEN M. GREENBAUM
Special Assistant District Attorney
BBO No. 629304

Berkshire District Attorney's Office
7 North Street
Pittsfield, MA 01201
Tel. (413) 443-5951
steven.m.greenbaum@mass.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Massachusetts Cases

Extrajurisdictional Cases

Statutes

Other Authorities

Acts and Resolves

Massachusetts Rules of Criminal Procedure

ISSUES PRESENTED

I. Whether the order allowing the motion for new trial should be vacated where the judge erroneously concluded that conviction for armed home invasion required proof that the defendant had been armed at the time of the initial breaking and entering into an attached garage, which preceded an armed entry through a locked garage door into the living quarters of the home.

II. Whether, in the event this court affirms the decision allowing the motion for new trial, the case should be remanded to the motion judge, who also was the trial judge, for reconsideration of the sentencing scheme.

STATEMENT OF THE CASE

On September 29, 2005, the defendant, Tony A. Tinsley,[1] was arraigned on Berkshire County Indictment No. 0576CR00186 on charges of (1) armed and masked robbery, G.L. c. 265, § 17; (2) assault and battery by means of a dangerous weapon, G.L. 265, § 15A(b); (3) assault and battery, G.L. c. 265, § 13A(a); (4) armed home invasion, G.L. c. 265, § 18C; and (5) armed burglary, G.L. c. 266, § 14. (Record Appendix – "RA"/6-8).

On June 19, 2007, a jury trial commenced. (RA/14). On June 27, 2007, the defendant was found guilty on all counts. (RA/15). The court sentenced him as

[1] The defendant's name is misspelled as "Tinsely" on this court's docket.

follows: Count (4) – 20 to 30 years; Count (5) – 10 to 15 years from and after Count (4); Count (1) – 10 to 15 years from and after Count (5); Count (2) – 2 to 5 years concurrent with Count (1); and Count (3) – 2½ years concurrent with Count (1). (RA/15). The Appellate Division of the Superior Court revised the sentences as follows: Count (4) – 30 to 35 years; Count (5) – 10 to 15 years concurrent with Count (4); Count (1) – 10 to 15 years concurrent with Count (4); and Count (2) – 2 to 5 years concurrent with Count (4). (RA/17-18). On February 11, 2009, the judgments of conviction were affirmed on appeal. *Commonwealth v. Tinsley*, 1:28 Opinion, 73 Mass.App.Ct. 1120; 2009 Mass.App.Unpub.LEXIS, rev. denied 453 Mass. 1108 (2009). (RA/18).

On August 2, 2019, the defendant filed a motion for a new trial as to Count 4, on the grounds that there had been insufficient evidence to prove that he had been armed prior to the unlawful entry into the attached garage of the victims' home, which had preceded the unlawful armed entry into the living quarters, and thus, there was insufficient evidence for a conviction for armed home invasion. (RA/28-49). On December 23, 2019, the court conducted a non-evidentiary hearing. (RA/19). On December 27, 2019, the court issued a written memorandum of decision allowing the motion but staying a hearing on appropriate relief pending the Commonwealth's appeal. (RA/23-27). The Commonwealth filed a notice of

appeal on January 23, 2020. (RA/20) The case was entered on this court's docket on February 21, 2020. (RA/21).

STATEMENT OF FACTS

Sometime around 11:15 p.m. on August 29, 2005, Lynn and Robert Kessler, and their seventeen-year-old son, Weston, had locked the doors and gone to bed at their secluded home in Pittsfield. (Transcript, Volume 3 – "Tr.3"/25-30, 134). Weston had left his keys inside a pickup truck parked inside the garage. (Tr.3/154-155). At about 1:00 a.m., Lynn was awakened by a creaking sound in the floor just outside her bedroom. (Tr.3/33). She got up and went to the threshold of the doorway, where she suddenly found herself "head to neck" with the defendant, who was dressed all in black. (Tr.3/33-34). He grabbed her and held what felt like a screwdriver to her neck. (Tr.3/33, 66). Lynn started screaming and calling her husband's name; she heard him call her name and then heard fighting to her right. (Tr.3/34-35).

Awakened by his wife's screams, Robert got up and ran to the foot of the bed, where he was struck with a wooden club on the left side of his face by a second intruder, Anthony Davis. (Tr.2/140; 3/101). The club split into jagged pieces and the blow split open Robert's jaw, spinning him around as he fell to the floor. (Tr.3/102-103). Davis, who was wearing gloves, got on Robert's back and started to choke him, telling him to "Shut up, Shut up. Be quiet." (Tr.3/103).

The defendant demanded of Lynn, "Get the money. Where is the money?" (Tr.3/36). Held by the defendant, she went into the bathroom to look for $48 she knew was there. (Tr.3/36). The defendant would not let her turn on the light, so she felt around the counter until she found the money. (Tr.3/36-37). Lynn put the money in the defendant's hand and felt that he was wearing gloves. (Tr.3/37). As they walked out of the bathroom, the defendant told her to turn on the light to a walk-in closet, where she saw her husband's wallet and handed the defendant the $1 that was in it. (Tr.3/37). The defendant brought her back to the bedroom. (Tr.3/37). When the defendant heard Weston in the hallway, he pushed Lynn onto the bed and hid behind her bedroom door. (Tr.3/37). The defendant said, "Third person," and Davis yelled, "Go get him." (Tr.3/38). The defendant ran out of the bedroom. (Tr.3/38).

Robert continued to struggle with Davis and managed to get to his feet and lunge backwards; both men lost their balance. (Tr.3/103-104). On the way down, Robert hit and injured his head on the corner of a bureau, and then both men hit the wall, leaving large holes. (Tr.3/104). They continued to struggle on the ground, where Davis attempted to stab Robert with a jagged piece of the wooden club; Robert defended with his left hand, suffering severed tendons and nerves. (Tr.3/104).

Weston had been awakened by his mother's screams and the sound of banging on the floor. (Tr.3/140). He grabbed a knife that he kept by the side of his bed, turned on the light in his room, and went out into the hallway. (Tr.3/140-141). He yelled to his mother and heard her say they were being robbed and to run to a neighbor to call 911. (Tr.3/37-38, 142). Weston returned to his room and unsuccessfully tried to call 911. (Tr.3/142). He went back into the hallway with his knife. (Tr.3/144).

Davis left Robert and ran out of the bedroom and into the hallway, where Weston stuck out the knife and cut Davis's arm. (Tr.3/145). Weston ran after Davis down the hallway into the kitchen. (Tr.3/146). Weston attempted to stab and tackle Davis, who was cut somewhere on his torso during the struggle. (Tr.3/147). Lynn ran to the kitchen and she and Weston managed to pull Davis's shirt up over his head; Lynn began to kick Davis with her bare feet. (Tr.3/41).

Meanwhile, Robert found the larger piece of the club with which he had been struck and ran down the hallway. (Tr.3/104-105). When he came upon his son and wife struggling with Davis, Robert hit him several times across the back of his neck. (Tr.3/105-106). Weston's hands were cut when Davis wrestled the knife

away from him, but Weston grabbed two more knives from a kitchen drawer. (Tr.3/151). Davis moved to the door to the garage, holding the knife, and threatening, "You mother fuckers come near me and I will kill you." (Tr.3/106-107).

Lynn called 911 and police and emergency personnel quickly arrived to take the family to Berkshire Medical Center for treatment of their injuries. (Tr.3/44-46). Lynn required twenty-five stitches to close a leg wound and subsequently needed knee surgery. (Tr.3/46). The wound on Robert's head was closed with staples and he required two surgeries in an attempt to repair his hand. (Tr.3/61-62). The cut on Weston's hand required stitches. (Tr.3/61).

Juror question

On the second day of deliberations, the jury submitted the following two questions concerning "Armed home invasion element number 3: One, does entry into the attached garage constitute entry into the dwelling house; two, does passing from the attached garage into the house constitute entering the dwelling place?" (Tr.7/4-5, 8-9). After conferring with counsel, the judge, with both counsel in agreement, informed the jury that the answer to each question was "yes." (Tr.7/5-9).

ARGUMENT

I. THE ORDER ALLOWING THE MOTION FOR NEW TRIAL SHOULD BE VACATED WHERE THE JUDGE ERRONEOUSLY CONCLUDED THAT CONVICTION FOR ARMED HOME INVASION REQUIRED PROOF THAT THE DEFENDANT HAD BEEN ARMED AT THE TIME OF THE INITIAL BREAKING AND ENTERING INTO AN ATTACHED GARAGE, WHICH PRECEDED AN ARMED ENTRY THROUGH A LOCKED GARAGE DOOR INTO THE LIVING QUARTERS OF THE HOME.

A judge may grant a new trial if it appears that justice may not have been done. Mass.R.Crim.P. 30(b). On review, the judge's conclusions are examined only to determine whether there has been a significant error of law or other abuses of discretion. *Commonwealth v. Fredette*, 97 Mass. App. Ct. 206, 217 (2020). Here, the motion judge, who was also the trial judge, made a significant error of law in concluding that there had been insufficient evidence to convict the defendant of the crime of armed home invasion.

The evidence that the defendant held the screwdriver to Lynn's neck immediately after his entry into the home through the garage door, (Tr.3/33-34, 66), permitted a reasonable inference that he had been armed with that implement at the time of his entry into the home. There was no evidence as to whether the defendant possessed the screwdriver at the time he broke into the garage. A large screwdriver that was found on the floor of the garage had been kept in a toolbox; it was not the weapon used by the defendant. (Tr.3/77-78).

On the basis of this evidence, the prosecutor, in her closing argument, asked the jury to infer that defendant and Davis had looked through the toolbox in the garage; she did not argue explicitly that the screwdriver used against Lynn had been taken from the toolbox. (Tr.6/47-48). At the motion hearing, the judge remarked that "the evidence seems clear that as alleged, the defendant and another entered the garage and armed himself from the garage and then entered the house with a screwdriver or some similar type instrument." (Motion Hearing Transcript – "Mot."/2).

The judge erroneously concluded that, because the defendant armed himself *after* unlawfully entering the attached garage of the home, the armed home invasion statute, G.L. c. 265, § 18C, could not apply to the subsequent armed unlawful entry through the locked door between the garage and into the living quarters of the victims' home. (RA/26-27). The defendant did not raise this issue in his motions for a required finding of not guilty, (Tr.5/59-60, 155; RA/58), nor did he object to the judge's answer to the jury question. (Tr.7/8). Based upon his determination that § 18C did not apply, the judge concluded that his answer to the jury question had been an error that created a substantial risk of a miscarriage of justice. (RA/27). *See Commonwealth v. McGovern*, 397 Mass. 863, 867-868 (1986) ("[f]indings [of guilt] based on legally insufficient evidence are inherently serious enough to create a substantial risk of a miscarriage of justice").

The judge's interpretation of the statute was incorrect. When interpreting a statute, the objective is to "ascertain and effectuate the intent of the Legislature," *Commonwealth v. Newberry*, 483 Mass. 186, 192 (2019), citing *Commonwealth v. Curran*, 478 Mass. 630, 633 (2018), by looking "to the words of the statute, 'construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished.'" *Commonwealth v. J.A.*, 478 Mass. 385, 387 (2017), quoting *Boston Police Patrolmen's Ass'n, Inc. v. Boston*, 435 Mass. 718, 720 (2002).

Given the purpose of c. 265, § 18C and its differences in purpose and language from the burglary statutes in c. 266, the Commonwealth submits that § 18C applies to the defendant's conduct. While the principal object of protection of the burglary statutes under c. 266 is property – the "dwelling house," the object of protection under the home invasion statutes in c. 265 is the "person" in the invaded dwelling. *Commonwealth v. Antonmarchi*, 70 Mass.App.Ct. 463, 467-468, rev. denied 450 Mass. 1105 (2007). The purpose of § 18C, with its minimum sentence of twenty years, is to more severely punish armed intruders who enter a dwelling while knowing, or having reason to know, that an occupant is present in the dwelling, because of the "dramatically heightened risk of a potentially deadly

encounter with a frightened or startled occupant." *Commonwealth v. Dunn*, 43 Mass.App.Ct. 58, 63-64 (1997).

It is fair to infer that a person who intrudes into an attached garage at 1:00 a.m., (Tr.3/33), and then breaks into the living quarters, intended to break into the living quarters when he broke into the garage. And in this case, there was evidence that the co-defendants tried to break directly into the living quarters prior to entering the garage, by placing a chair beneath a window on the back deck of the home and pulling out a screen. (Tr.4/94-95). Where that person is armed prior to entering the living quarters through a locked door, (Tr.3/28-30, 138-139), it is reasonable to infer that he does so with the knowledge or anticipation that there will be people inside. This was certainly so in this case, where there were motor vehicles inside the garage, (Tr.3/27, 51, 60, 76, 78, 137), one of which still had the keys in it. (Tr.3/154-155). Therefore, for the purposes of § 18C, it should not matter whether the person was armed when he entered the garage or, instead, armed himself in the garage prior to breaking into the living quarters.[2] Common sense thus demands that a person who unlawfully enters an unoccupied attached garage, arms himself therein, and then unlawfully enters the living quarters of the

[2] At the motion hearing, the judge appears to have misunderstood the Commonwealth's argument to imply that an armed intruder, who breaks into an attached garage and therein encounters a person whom he assaults, would *not* be liable under § 18C. (Mot./7).

house, is in violation of the statute (provided the knowledge and assault elements also are met).

An interpretation of a statute that leads to an unreasonable result should be rejected in favor of the one that leads to a reasonable result. *Coffey v. County of Plymouth*, 49 Mass. App. Ct. 193, 196 (2000). Under the motion judge's interpretation, a person who arms himself outside a home and then breaks directly into the living quarters may be liable under § 18C. But if the same person first breaks into an attached garage, arms himself therein, and *then* breaks into the living quarters, he cannot be liable. Where this result is unreasonable and inconsistent with the legislative purpose of protecting people from armed intruders, *Dunn, supra,* it "'could not be what the Legislature intended,' and fails to 'effectuate the intent of the Legislature in a way that is consonant with sound reason and common sense.'" *Commonwealth v. Wassilie*, 482 Mass. 562, 573 (2019) (citations omitted).

The judge's reliance on *Commonwealth v. Goldoff,* 24 Mass.App.Ct. 458, rev. denied 400 Mass. 1105 (1987), (RA/25-27), also leads to an unreasonable result. In *Goldoff,* the court concluded that for purposes of burglary under G.L. c. 266, § 14, the secured common hallway of an apartment building falls within the meaning of "dwelling house." *Id.* at 281. According to the motion judge, therefore, an unarmed intruder who breaks into the secured common hallway of an

apartment building and, *then* arms himself, prior to breaking into his targeted apartment, could not be found liable under § 18C. This result cannot be consistent with the legislative intent.

Contrary to the judge's conclusion, (RA/26), the Commonwealth's proposed interpretation is consistent with the Court's reasoning in *Commonwealth v. Ruiz*, 426 Mass. 391 (1998). In *Ruiz*, the defendant broke into an apartment and, while struggling with an occupant, grabbed the victim's crutch and struck him with it. *Id.* at 391-392. In concluding that this conduct did not constitute a violation of § 18C, the Court emphasized that a critical difference between § 18C and the related statutes, G.L. c. 265, 18A (armed assault in a dwelling house) and G.L. c. 266, § 14 (armed burglary), is the scienter requirement that the armed invader have actual or constructive knowledge that others are inside. *Id.* at 393-394. Unlike the defendant in *Ruiz*, here the defendant did not arm himself after being confronted by an occupant. He armed himself inside the garage, in preparation for any encounter with an occupant inside the living quarters, thereby presenting, and ultimately realizing, precisely the dramatically heightened risk of a potentially deadly encounter with an occupant at which § 18C is targeted.

The use of the term "dwelling place," in § 18C, as opposed to "dwelling house," provides support for the Commonwealth's position. The Legislature is presumed to be aware of existing statutes when it enacts a new statute.

Commonwealth v. Russ R., 433 Mass. 515, 520 (2001). "The omission of particular language from a statute is deemed deliberate where the Legislature included the omitted language in related or similar statutes." *Commonwealth v. Johnson*, 482 Mass. 830, 835 (2019), quoting *Fernandes v. Attleboro Hous. Auth.*, 470 Mass. 117, 129 (2014). The related statutes, G.L. c. 265, § 18A and G.L. c. 266, § 14, both use the term, "dwelling house."[3] When enacted in 1956, § 18A used the term, "dwelling house," St.1956, c.408; §18C. When enacted thirty-seven years later in 1993, § 18C omitted the term, "dwelling house," and, instead, used the term, "dwelling place of another." St. 1993, c. 333.

Admittedly, the terms often are interchangeable, as demonstrated in *Commonwealth v. Marshall*, 65 Mass.App.Ct. 710 (2006), where the court looked to cases construing "dwelling house," in order to help define "dwelling place of another" in § 18C. *Id.* at 715-716; *see* also *Commonwealth v. Pfeiffer*, 482 Mass. 110, 132 (2019) (referring to arson of a "dwelling house" under G.L. c. 266, § 1 as "arson of a dwelling place" in discussion of gravity of that crime). But the

[3] The Commonwealth could find only one other criminal statute which employs the term, "dwelling place of another." G.L. c. 272, § 68 (vagabonds). The following statutes also employ the term, "dwelling place:" G.L. c. 43, §§ 70, 84, 98 (service of notice for city council meetings); G.L. c. 79, § 8B (vacation of property taken by eminent domain; G.L. c. 111, § 127B (fitness for human habitation).

issue before the court in *Marshall* was whether a defendant's ownership interest in an apartment into which he had intruded could mean that the apartment was not the "'dwelling place of *another*.'" *Marshall, supra* at 714 (emphasis original). The court concluded that both a "dwelling house" and a "dwelling place of another" is a "place of habitation, a place in which to sleep," and, thus, the question regarding any particular dwelling "turns on occupancy and not ownership interests." *Id.* at 716.

In addressing the meaning of "dwelling house," the courts have been concerned with structures or buildings and what parts of such structures may be deemed "places of habitation," thus presenting the possibility that people will be present somewhere within that structure. E.g., *Goldoff, supra* at 460-463. In order to "further rather than frustrate the purpose of [the burglary] statutes, the term 'dwelling house' as used in the context of burglary always has been construed broadly." *Id.* at 462. And where the principal object of protection of the burglary statutes is the *property* in which a person might dwell, *Antonmarchi, supra*, the *Goldoff* court concluded that the secured common hallway of an apartment building is included within the meaning of "dwelling house" for the purposes of G.L. c. 266, § 14. *Goldoff, supra* at 462-463.

Likewise, in order to further rather than frustrate the purpose of § 18C, whose principal object of protection is the *people* inside a dwelling, *Antonmarchi, supra*, the term, "enters the dwelling place of another" also should be construed broadly so as to effectuate the Legislature's intent. The term, "dwelling place of another," in § 18C, "refers to a place of habitation, *a place in which to sleep*." *Marshall, supra* at 716 (emphasis supplied). The statute can and should be interpreted to apply to any unlawful entry into a location which can reasonably be deemed a discrete place of habitation or place in which to sleep, regardless of whether that entry was preceded by prior unlawful entries into the structure or "dwelling house" within which that "dwelling place" is located. An initial, unarmed break into an attached garage should not nullify the application of § 18C to an intruder who then arms himself inside the garage prior to breaking and entering into the living quarters with the requisite knowledge and who then subsequently threatens or assaults an occupant.

A Connecticut case helps illustrate this rationale. In *State v. Bennett*, 187 Conn. App. 847 (Conn.App.Ct. 2019), rev. denied, 331 Conn. 924 (2019), the court considered whether the defendant's separate sentences for convictions for burglary and home invasion constituted double jeopardy violations. *Id.* at 851. The convictions were based upon unlawful entry into a home with the intent to commit

a larceny (burglary) and the subsequent use of a gun during the larceny, giving rise to the act of robbery (home invasion). *Id.* at 854-855.[4]

In determining whether the two charges arose out of the same act or transaction, the court looked at whether separate factual bases for the burglary and home invasion charges could reasonably have been found. *Bennett*, *supra* at 853. The court concluded that the initial unlawful entry with the intent of committing a larceny could reasonably be a factual basis to support the burglary charge; and that

---

[4] The pertinent Connecticut statutes differ somewhat from the statutes at issue in this case. The burglary statute provides that:

> A person is guilty of burglary in the first degree when (1) such person enters or remains unlawfully in a building with intent to commit a crime therein and is armed with explosives or a deadly weapon or dangerous instrument, or (2) such person enters or remains unlawfully in a building with intent to commit a crime therein and, in the course of committing the offense, intentionally, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone, or (3) such person enters or remains unlawfully in a dwelling at night with intent to commit a crime therein.

Conn. Gen. Stat. § 53a-101(a). The home invasion statute provides that:

> A person is guilty of home invasion when such person enters or remains unlawfully in a dwelling, while a person other than a participant in the crime is actually present in such dwelling, with intent to commit a crime therein, and, in the course of committing the offense: (1) Acting either alone or with one or more persons, such person or another participant in the crime commits or attempts to commit a felony against the person of another person other than a participant in the crime who is actually present in such dwelling, or (2) such person is armed with explosives or a deadly weapon or dangerous instrument.

Conn. Gen. Stat. § 53a-100aa(a).

the subsequent pointing of a gun at a victim's head while demanding money and drugs could reasonably support the home invasion charge. *Id.* at 854-855. The court explained,

> ... the burglary charge arose from the distinct and separate act of *entering* the dwelling at night with the intent to commit a larceny, while the home invasion arose from the separate act of *threatening the use of physical force* against [a victim] after the defendant [and his co-venturer] entered the home and were committing the larceny.

Id. at 855 (emphasis original). Applying this rationale to the instant case, a burglary arose from the distinct and separate act of entering the garage with the intent to steal, while the armed home invasion arose from the separate act of breaking and entering through the locked entry door in the garage into the living quarters while armed, knowing or having reason to know people were inside, and then using force and causing injury to one of those people.

The motion judge incorrectly determined that, under the Commonwealth's interpretation, "each entry into a room, closet, or ancillary space where a person is located would be considered a separate crime." (RA/26). Entries into rooms within living quarters such as closets, laundry rooms, or pantries, etc., could rarely, if ever, be violations of § 18C because they cannot reasonably be deemed to be discrete places of habitation or places in which to sleep. The unit of prosecution under § 18C is the person(s) assaulted, *Antonmarchi*, *supra* at 468, not the number of separate breaks within the dwelling place.

Consistent with the law on burglary, an armed home invader who first breaks into an attached garage and then into the living quarters cannot be charged with separate violations of § 18C on the basis of each break. *Commonwealth v. Bolden*, 470 Mass. 274, 280 (2014) (subsequent separate breaks within a dwelling do not support separate convictions for burglary). It is not the armed entry, by itself, which constitutes the crime of armed home invasion. A violation of § 18C requires the use or imminent threat of force, or intentionally caused injury, upon any person within the dwelling place.

The motion judge's decision was based entirely on the erroneous interpretation of the law -- the responses to the juror questions were correct and the evidence was sufficient for conviction on Count 4. Where the evidence was sufficient and there was no error, there was no substantial risk of a miscarriage of justice. *Commonwealth v. Wood*, 90 Mass.App.Ct. 271, 287 (2016). The defendant's motion for a new trial should have been denied.

II. IN THE EVENT THIS COURT AFFIRMS THE DECISION ALLOWING THE MOTION FOR NEW TRIAL, THE CASE SHOULD BE REMANDED TO THE MOTION JUDGE, WHO ALSO WAS THE TRIAL JUDGE, FOR RECONSIDERATION OF THE SENTENCING SCHEME.

In the event this court affirms the decision of the motion judge, it should remand the case to the motion judge, who also was the trial judge, for reconsideration of the sentencing scheme. "The subtraction of one or more of [a

sentencing] scheme's interdependent elements may disrupt its intended proportions and purposes, and warrant its entire reconstruction within statutory limits by the sentencing judge or a successor. Thus, in cases in which [an appellate court] reverses one or more of several convictions resulting from the same trial, it may remand the case to the trial judge for reconsideration of the entire sentencing scheme. " *Commonwealth v. Leggett*, 82 Mass.App.Ct. 730, 735 (2012). In this case, after modification on sentence appeal, the defendant received his most substantial sentence of 30 to 35 years on Count 4, with all other lesser sentences concurrent. (RA/17-18). The court had originally sentenced the defendant to terms of 20 to 30 years on Count 4, 10 to 15 years on Count 5 (armed burglary) on and after Count 4, 10 to 15 years on Count 1 (armed and masked robbery) on and after Count 5, and concurrent terms on the assault and battery counts; representing an aggregate sentence of 40 to 60 years. (Tr.7/25-27; RA/15). Restructuring of the sentencing scheme, so that the intended proportions and purposes of the original sentencing scheme, as revised, will be met, is appropriate in this case.

CONCLUSION

For the foregoing reasons, the Commonwealth requests that this court reverse the order allowing the defendant's motion for new trial.

Respectfully submitted,

By: /s/ Andrea Harrington
Andrea Harrington
Berkshire District Attorney

By: /s/ Steven M. Greenbaum
Steven M. Greenbaum
Special Assistant District Attorney
Berkshire District
7 North Street
Pittsfield, MA 01201
Tel. (413) 443-5951
steven.m.greenbaum@mass.gov
BBO #629304

Dated: June 2, 2020

ADDENDUM

TABLE OF CONTENTS

(54)

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 05-0186

COMMONWEALTH OF MASSACHUSETTS

v.

TONY TINSLEY

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL

BACKGROUND

This case involved the breaking and entering into a Pittsfield home on August 29, 2005 by the defendant and Anthony Davis. Violent assaults occurred on the occupants, members of the Kessler family, and money was stolen. The trial of Tinsley was held in June 2007 and guilty verdicts were returned on indictments for Armed Home Invasion, Armed Burglary, Armed Robbery, Assault and Battery by means of a Dangerous Weapon and Assault and Battery. The defendant was sentenced to 30-35 years in MCI-Cedar Junction on the Armed Home Invasion charge and concurrent sentences on the other indictments.[1] In February 2009, the Appeals Court affirmed the convictions with a 1:28 decision. This Motion for a New Trial was filed on August 6, 2019.

The legal issue before the court is based on the evidence that in making an entry into the home, Tinsley first entered an attached garage, armed himself with a dangerous weapon (screwdriver) and then entered the living quarters of the house wherein he assaulted the occupants with the weapon.

It is the defendant's position that his entry into the attached garage, unarmed, was the entry into the "dwelling place of another" and since he was unarmed at the time of that entry, the statute is not satisfied. To be found guilty, he must have entered the dwelling place of another with the weapon in his possession; acquiring a weapon while in the dwelling is insufficient. In other words, being in an attached garage is legally the same as being in the living space of the home for the purpose of the statute.

[1] The original sentences were modified by the Appellate Division of the Superior Court.

The defendant did not raise this issue at any point during the trial or at the charge conference. The jury, during its deliberations, asked the following question: "Does entry into the attached garage constitute entry into the dwelling house; two, does passing from the garage into the house constitute entering the dwelling place?" Both counsel and the court agreed that the answer to both questions was "Yes."

The defendant now claims that the second question was answered incorrectly or insufficiently as the court should have made it clear that the defendant had to be armed before entering the garage, as the garage is considered the "dwelling place of another." The Commonwealth argues that an attached garage to a house is not a "dwelling place of another" and it was the entry into the living space of the home with the dangerous weapon that was taken from the garage that triggered the statute. Consequently, the issue before me is the legal meaning of the term "the dwelling place of another" under the statute.

DISCUSSION

As a preliminary matter, I see no reason why this claim could not have been raised in the defendant's direct appeal. The defendant does not base the challenge on new law or facts. Rather, he simply contends that the instructions to the jury were in error or incomplete. A claim is waived when a "defendant fails to raise a claim that is generally known and available at the time of trial or direct appeal or in the first motion for postconviction relief." *Rodwell v. Commonwealth*, 432 Mass. 1016, 1018 (2000). See Mass. R. Crim. P. 30 (c) (2).

However, "[a]ll claims, waived or not, must be considered. The difference lies in the standard of review that we apply when we consider the merits of an unpreserved claim." *Commonwealth v. Randolph*, 438 Mass. 290, 293–294 (2002) (footnote omitted). That is particularly appropriate where, as here, the parties have fully briefed the issue that is at the crux of the appeal. *Commonwealth v. Murphy*, 73 Mass. App. Ct. 57, 60 (2008). In these circumstances, I must "review any error to determine whether it may have created a substantial risk of a miscarriage of justice." *Commonwealth v. Walker*, 443 Mass. 867, 871 (2005) (involving waived claims that unappealed ruling was clearly erroneous and counsel's failure to appreciate merits of appeal constituted ineffective assistance). See *Commonwealth v. Acevedo*, 446 Mass. 435, 442 (2006) (review of motion for new trial, whether based on error or as claim of ineffective assistance, is "solely to determine whether the error gives rise to a substantial risk of a miscarriage of justice").

The substantial risk standard requires me to determine "if we have a serious doubt whether the result of the trial might have been different had the error not been made." *Commonwealth v. LeFave*, 430 Mass. 169, 174 (1999). The evidence and the case is considered as a whole, including the strength of the Commonwealth's case, the nature of the error, the significance of the error in the context of the trial, and the possibility that the absence of an objection was the result of a reasonable tactical decision. See *Commonwealth v. Chase*, 433 Mass. 293, 299 (2001); *Commonwealth v. Alphas*, 430 Mass. 8, 13 (1999). "A new trial will be ordered only in the extraordinary situation where, after such a review, we are left with uncertainty that the defendant's guilt has been fairly adjudicated." *Commonwealth v. Chase*, supra at 299.

As noted by the Commonwealth, the motion presents an issue of law of first impression in Massachusetts regarding the armed home invasion statute. Accordingly, I accepts the facts as presented in the defendant's memorandum.

Starting with the statute, G.L. c. 265, § 18C, a person commits armed home invasion if he "knowingly enters the dwelling place of another knowing or having reason to know that one or more persons are present within ... while armed with a dangerous weapon, [and] uses force or threatens the imminent use of force upon any person within such dwelling place whether or not injury occurs, or intentionally causes any injury to any person within such dwelling place." G.L. c. 265, § 18C. The felony of armed home invasion has four separate elements,

> "To obtain a conviction of [the crime], the Commonwealth must prove that the defendant (1) knowingly entered the dwelling place of another; (2) knowing or having reason to know that one or more persons are present therein, or, having entered without such knowledge, remained in the dwelling place after acquiring or having reason to have acquired such knowledge; (3) while armed with a dangerous weapon; and (4) used force or threatened the imminent use of force upon any person within such dwelling place, whether or not injury occurred, or intentionally caused injury to any person within such dwelling place. G.L. c. 265, § 18C."
>
> *Commonwealth v. Brown*, 451 Mass. 200, 205 (2008), citing *Commonwealth v. Doucette*, 430 Mass. 461, 465–466 (1999).

The Supreme Judicial Court held that the statute applied to a perpetrator who was armed before entering a dwelling house. *Commonwealth v. Ruiz*, 426 Mass. 391, 392-394 (1998)("Both §§ 18A and 18C require the Commonwealth to prove that the defendant was armed with a dangerous weapon at the time of entry into a dwelling house.").

Consequently, this is an issue of statutory interpretation that rests with the appellate courts *de novo* and my interpretation of "dwelling place of another" is given little weight. However, for the purposed of fostering an appeal, I note that the statute does not define the term "dwelling place of another" and where, as here, statutory terms are undefined, I must construe them according to their ordinary sense and plain meaning, taking into account the context in which they are employed, the policy and purpose of the legislation, and the potential consequences of adopting a given interpretation.

The "term 'dwelling house' as used in the context of burglary always has been construed broadly[.]" *Commonwealth v. Goldoff*, 24 Mass. App. Ct. 458, 462 (1987).[2] The Appeals Court in *Goldoff* ruled that a "dwelling house" includes the apartment unit and the areas under his or her exclusive control as well as any secured common hallways. The Court stated that,

---

[2] Our courts have used the burglary statute to help define the terms in the home invasion statute. *Commonwealth v. Smith*, 75 Mass. App. Ct. 196, 200 (2009). "The home invasion statute and the burglary statutes all seek to protect the home. The unlawful entry in the one case is as destructive of that sanctity as in the other. Thus, the meaning of the word 'entry' in the burglary statutes applies here as well and we conclude that an entry for purposes of the home invasion statute occurs when there is 'any intrusion into a protected enclosure by any part of a defendant's body.' " *Commonwealth v. Stokes*, 440 Mass. 741, 748 (2004), quoting from *Commonwealth v. Burke*, 392 Mass. 688, 690 (1984).

> "It is the purpose of burglary statutes, however, to prohibit that conduct which violates a person's right of security in a place universally associated with refuge and safety, the dwelling house. To further rather than frustrate the purpose of these statutes, the term "dwelling house" as used in the context of burglary always has been construed broadly. "By the common law, every house for the dwelling and habitation of man is taken to be a mansion house, wherein burglary may be committed.... Any outhouses, within the curtilage or some common fence as the mansion itself, must be considered as parcel of the mansion.... [I]f the outhouses be adjoining the dwelling house, and occupied as parcel thereof, though there be no common enclosure or curtilage, they may still be considered as parts of the mansion." The "historical background of the burglary statutes, the traditional meaning given to 'dwelling' and 'dwelling house' by legal dictionaries and treatises," show that the term may comprehend areas within a person's place of habitation but which are beyond his exclusive control."
>
> *Id.* at 462.

As noted by the Commonwealth, the Appeals Court in *Commonwealth v. Marshall*, 65 Mass. App. Ct. 710, 714 (2006), concluded that "dwelling place of another" under §18 is interchangeable with the term "dwelling house" as used in the burglary statutes.

The Commonwealth's argument is that by using the term "dwelling place of another," rather than "dwelling house," the Legislature intended two different interpretations. Under §18, "any break by armed intruders into a separate, discrete place within a structure, where such intruders have actual or constructive knowledge that people may be present inside that place, is a violation of §18, regardless of whether the intruders have armed themselves during earlier breaks into the structure prior to entry into the 'dwelling place.'" *Commonwealth's Memorandum* p. 6. Under this interpretation, the answer to the jury question was correct.

This interpretation would establish liability for an armed home invasion if a defendant enters a dwelling without a weapon but upon learning that residents were hiding in an upstairs bedroom, obtains a weapon and enters the bedroom. Under this perspective, each entry into a room, closet, or ancillary space where a person is located would be considered a separate crime. Such a result appears contrary to commonsense and *Commonwealth v. Ruiz*, 426 Mass. at 392-394.

Given the past ruling by the appellate courts, I believe that the terms "dwelling place of another," and "dwelling house," have similar meanings. See *Commonwealth v. Pfeiffer*, 482 Mass. 110, 132 (2019). I further believe that the entry into the garage was an entry into the dwelling place of another under §18. When the historical right to security in one's place of habitation is considered in the context of contemporary structures, I can think of no reason why the term "the dwelling place of another" should not apply to secure garages, basements or attics; locations that typically are ancillary to the living areas. Today many attached garages are used as recreational spaces, workshops, studios or entertainment venues. It would be incongruous to find that they are not afforded the same protection and security as interior living space. "It is the purpose of burglary statutes ... to prohibit that conduct which violates a person's right of security in a place universally associated with refuge and safety, the dwelling house." *Goldoff*, 24 Mass. App. Ct. supra at 462. See *Commonwealth v. Willard*, 53 Mass. App. Ct. 650, 654–655 (2002)

(property secured within structure with expectation that it will be protected against theft is "under the protection of the building").[3]

Accepting the broad definition of "dwelling" best serves the apparent legislative purpose behind the enactment of the statute. Burglaries of occupied residences are singled out for heightened punishment because they pose an increased risk of injury. There is a much greater possibility of confronting the resident and a substantial risk that force will be used and that someone will be injured, than if one burglarized a building that was not intended for use as habitation, such as an office building or a warehouse. This elevated risk exists whether the human habitation in question is a single-family home or apartment or "[a]ny outhouses, within the curtilage or some common fence". *Goldoff*, 24 Mass. App. Ct. supra at 462. The concerns caused by residential burglary are independent of the size, configuration or attached structures of the dwelling.

The defendant became armed only after entering the dwelling (garage) and, accordingly, the armed home invasion statute would not apply to this situation. My error in answering the jury question created a substantial risk of a miscarriage of justice. See *Commonwealth v. Walker*, 443 Mass. 867, 871 (2005). The defendant Motion for a New Trial is ALLOWED, and he is entitled to relief from this conviction.

Given that this statutory interpretation is best left to the appellate courts, I will give the Commonwealth an opportunity to appeal this decision before scheduling a hearing on appropriate relief. The Commonwealth will have 30 days from receipt of this decision to file a Notice of Appeal.

SO ORDERED

12/27/19
Date

Associate Justice, Superior Court

THE COMMONWEALTH OF MASSACHUSETTS
BERKSHIRE S.S. SUPERIOR COURT
DEC 27 2019
Deborah Shyavan

[3] "Decisions from other States interpreting their burglary and breaking and entering statutes are of limited value given the differences in statutory expression." *Commonwealth v. Rudenko*, 74 Mass. App. Ct. 396, 400 (2009)(the locked, fenced-in delivery hall is part of the Home Depot building and under the protection of G.L. c. 266, § 16).

Massachusetts General Laws, chapter 265, section 18C
G.L. c. 265, § 18C

§ 18C. Home Invasion.

Whoever knowingly enters the dwelling place of another knowing or having reason to know that one or more persons are present within or knowingly enters the dwelling place of another and remains in such dwelling place knowing or having reason to know that one or more persons are present within while armed with a dangerous weapon, uses force or threatens the imminent use of force upon any person within such dwelling place whether or not injury occurs, or intentionally causes any injury to any person within such dwelling place shall be punished by imprisonment in the state prison for life or for any term of not less than twenty years.

Massachusetts General Laws, chapter 265, section 18A
G.L. c. 265, § 18A

§ 18A. Armed Assaults in Dwelling Houses.

Whoever, being armed with a dangerous weapon, enters a dwelling house and while therein assaults another with intent to commit a felony shall be punished by imprisonment in the state prison for life, or for a term of not less than ten years. No person imprisoned under this paragraph shall be eligible for parole in less than five years.

Whoever, being armed with a dangerous weapon defined as a firearm, shotgun, rifle or assault weapon, enters a dwelling house and while therein assaults another with intent to commit a felony shall be punished by imprisonment in the state prison for a term of not less than ten years. Such person shall not be eligible for parole prior to the expiration of ten years.

Massachusetts General Laws, chapter 266, section 14
G.L. c. 266, § 14

§ 14. Burglary, Being Armed or Making an Assault.

Whoever breaks and enters a dwelling house in the night time, with intent to commit a felony, or whoever, after having entered with such intent, breaks such dwelling house in the night time, any person being then lawfully therein, and the offender being armed with a dangerous weapon at the time of such breaking or entry, or so arming himself in such house, or making an actual assault on a person lawfully therein, shall be punished by imprisonment in the state prison for life or for any term of not less than ten years.

Whoever commits any offense described in this section while armed with a firearm, rifle, shotgun, machine gun or assault weapon shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 15 years. Whoever commits a subsequent such offense shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 20 years. The sentence imposed upon a person who, after being convicted of any offence mentioned in this section, commits the like offence, or any other of the offences therein mentioned, shall not be suspended, nor shall he be placed on probation.

Commonwealth v. Tinsley

Appeals Court of Massachusetts

February 11, 2009, Entered

08-P-278

Reporter
2009 Mass. App. Unpub. LEXIS 151 *

COMMONWEALTH vs. TONY A. ***TINSLEY***. [1]

Notice: DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28 ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, RULE 1:28 DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

Subsequent History: Reported at Commonwealth v. Tinsley, 73 Mass. App. Ct. 1120, 900 N.E.2d 913, 2009 Mass. App. LEXIS 200 (2009)

Disposition: [*1] Judgments affirmed.

Core Terms

bloodstained, battery, wounds, armed, assault and battery, evidence challenge, dangerous weapon, boxer shorts, paper towel, trial judge, trash bag, no merit, corroborate, screwdriver, discarded, grabbing, assault, charges, purple, pushed, tended, socks, towel, neck, pair

Judges: Green, Brown & Vuono, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals his conviction by a Superior Court jury on charges of armed robbery while masked, assault and battery by means of a dangerous weapon, assault and battery, armed home invasion, and armed burglary. We affirm.

1. *Admission of challenged evidence*. There is no merit to the defendant's contention that the trial judge erred in admitting certain items of physical evidence. [2] The boxer shorts and the purple towel, discovered in a trash bag outside the defendant's apartment, were relevant circumstantially to connect the defendant to Anthony Davis, the coventurer in the charged crimes. [3] The

[1] Also known as Anthony A. Tinsley, Tone.

[2] The challenged evidence consists of a pair of bloodstained boxer shorts, a bloodstained purple towel, bloodstained paper towels, two pairs of socks, and two black T-shirts.

[3] The T-shirts and the socks, discarded in the same trash bag, similarly related to the crime scene, and tended to corroborate the victims' accounts of how the crimes unfolded.

discarded paper towels illustrated the severity of the wounds sustained by Davis during commission of the crimes, as well as the efforts Davis employed to treat the wounds without medical attention; viewed together with the defendant's inconsistent statements to police and to others, the evidence tended to corroborate the proposition that the defendant and Davis sought to evade attention to Davis's wounds by anyone in a position of authority following the incident at the victims' home (despite the fact **[*2]** that such attention was clearly warranted). We conclude that the trial judge did not abuse his considerable discretion in deciding that the probative value of the evidence exceeded its potential for prejudice. See *Commonwealth v. Zagranski*, 408 Mass. 278, 289, 558 N.E.2d 933 (1990); *Commonwealth v. Roderick*, 411 Mass. 817, 819, 586 N.E.2d 967 (1992); *Commonwealth v. Berry*, 420 Mass. 95, 109, 648 N.E.2d 732 (1995).

2. *Duplicative convictions*. The evidence readily established acts of unarmed battery sufficient to support the charge of simple assault and battery, separate from the acts supporting the charge of assault and battery by means of a dangerous weapon. The latter charge was established by the defendant's act of holding a screwdriver to the neck of one of the victims. Later during the encounter between the defendant and the same victim (after the defendant led her to different rooms **[*3]** in search of cash), the defendant pushed the victim onto a bed. [4]

Judgments affirmed.

By the Court (Green, Brown & Vuono, JJ.),

Entered: February 11, 2009.

[4] Because the later act of pushing supports the lesser charge, we need not consider the defendant's contention that the initial act by the defendant of grabbing the victim was so closely related to the act of placing a screwdriver to her neck as to constitute but one continuous action. Though the defendant observes that the Commonwealth referred in its closing only to the initial act of grabbing the victim, there is no merit to the defendant's suggestion at oral argument that the Commonwealth is limited to that statement. It is the judge's instruction to the jury that controls, rather than the arguments of counsel, and the evidence plainly supported the jury's conclusion that the elements of both charges were met by separate acts. We note that the judge also instructed the jurors that all of them must agree on at least one specific touching. [Tr. VI:110]

End of Document

Neutral
As of: April 8, 2020 4:36 PM Z

State v. Bennett

Appellate Court of Connecticut

October 25, 2018, Argued; February 19, 2019, Officially Released

AC 40443

Reporter
187 Conn. App. 847 *; 204 A.3d 49 **; 2019 Conn. App. LEXIS 62 ***

STATE OF CONNECTICUT v. CALVIN BENNETT

Subsequent History: Appeal denied by State v. Bennett, 331 Conn. 924, 206 A.3d 765, 2019 Conn. LEXIS 134 (Conn., May 8, 2019)

Prior History: [*1]** Substitute information charging the defendant with the crimes of aiding and abetting murder, felony murder, home invasion and burglary in the first degree, brought to the Superior Court in the judicial district of Waterbury and tried to a three judge court, Cremins, Crawford and Schuman, Js.; judgment of guilty, from which the defendant appealed to our Supreme Court, which reversed the judgment in part and remanded the case for further proceedings; thereafter, the court, Fasano, J., denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court.

State v. Bennett, 307 Conn. 758, 59 A.3d 221, 2013 Conn. LEXIS 25 (Feb. 5, 2013)

Disposition: Affirmed.

Core Terms

burglary, home invasion, dwelling, first degree, sentence, apartment, charges, same act or transaction, participant in a crime, intent to commit, same offense, separate act, susceptible, jeopardy, larceny, floor, double jeopardy, commit larceny, incidental, unlawfully, quotation, bedroom, robbery, double, marks, night

Case Summary

Overview
HOLDINGS: [1]-Defendant's sentence for both burglary in the first degree in violation of Conn. Gen. Stat. § 53a-101(a)(3) and home invasion in violation of Conn. Gen. Stat. § 53a-100aa(a)(1) did not violate his constitutional protection against double jeopardy under the Fifth Amendment to the United States Constitution because the burglary in the first degree and home invasion charges arose from a transaction that was susceptible to separation into parts. The burglary charge arose from the distinct and separate act of entering the dwelling at night with the intent to commit a larceny, while the home invasion charge arose from the separate act of threatening the use of physical force against an occupant after the defendant entered the home and was committing the larceny.

Outcome
Court affirmed the judgment of the trial court.

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental

Rights > Procedural Due Process > Double Jeopardy

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Illegal Sentences

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Constitutional Law > Bill of Rights > State Application

HN1 **Procedural Due Process, Double Jeopardy**

Ordinarily, a claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is reviewed pursuant to the abuse of discretion standard. A double jeopardy claim, however, presents a question of law, over which the court's review is plenary. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. The Double Jeopardy Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment. This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Tests for Double Jeopardy Protection

HN2 **Procedural Due Process, Double Jeopardy**

Double jeopardy analysis in the context of a single trial is a two-step process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met. If the court determines that the charges do not arise from the same act or transaction, it does not need to proceed to the second step of the analysis. At step one, it is not uncommon that the court looks to the evidence at trial and to the state's theory of the case in addition to the information against the defendant, as amplified by the bill of particulars.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Tests for Double Jeopardy Protection

HN3 **Procedural Due Process, Double Jeopardy**

If it is determined that charges against a defendant arise out of the same act or transaction, then the court proceeds to step two, where it must be determined whether the charged crimes are the same offense. At this second step, the Appellate Court of Connecticut traditionally has applied the Blockburger test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. In applying the Blockburger test, the court looks only to the information and bill of particulars-as opposed to the evidence presented at trial-to determine what constitutes a lesser included offense of the offense charged. This test is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > Tests for Double Jeopardy Protection

HN4 **Procedural Due Process, Double Jeopardy**

The same transaction may constitute separate and distinct crimes where it is susceptible of separation into parts, each of which constitutes a completed offense.

The test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the statute. When determining whether two charges arose from the same act or transaction, the Connecticut Supreme Court has asked whether a jury reasonably could have found separate factual basis for each offense charged.

Syllabus

The defendant, who had been convicted by a three judge panel of the crimes of felony murder, home invasion and burglary in the first degree in connection with the shooting death of the victim, appealed to this court from the trial court's denial of his motion to correct an illegal sentence. On appeal, the defendant claimed that his sentence for both burglary in the first degree and home invasion violated his constitutional protection against double jeopardy because the home invasion was part of the same transaction as the burglary and his intent throughout the transaction was to carry out a larceny. **[***2]** *Held* that the defendant's conviction of burglary in the first degree and home invasion did not violate his constitutional protection against double jeopardy; although the defendant claimed that the robbery that gave rise to the home invasion was incidental to the completion of the larceny that gave rise to the burglary charge and, therefore, could be considered as part of an uninterrupted course of conduct in furtherance of the burglary, the acts were susceptible to separation into parts that supported a conviction of both burglary in the first degree and home invasion, as the burglary charge arose from the defendant's distinct and separate act of entering the victim's dwelling at night with the intent to commit a larceny, while the home invasion charge arose from the defendant's separate act of threatening the use of physical force against the victim's girlfriend after the defendant and an associate entered the home and were committing the larceny, and although the defendant's conduct constituted one transaction and the defendant may have had the intent to commit a larceny throughout the transaction, the defendant's intent was not a factor in determining whether the transaction was **[***3]** susceptible to separation into parts that supported a conviction of both crimes.

Counsel: W. Theodore Koch III, assigned counsel, for the appellant (defendant).

Linda Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were Maureen Platt, state's attorney, and John Davenport, senior assistant state's attorney, for the appellee (state).

Judges: DiPentima, C. J., and Elgo and Harper, Js. In this opinion the other judges concurred.

Opinion by: HARPER

Opinion

[*848] [50]** HARPER, J. The defendant, Calvin Bennett, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant argues that the court improperly rejected his claim that his sentence for both burglary in the first degree in violation of General Statutes § 53a-101 (a) (3)[1] **[**51]** and home invasion in violation of General Statutes § 53a-100aa (a) (1)[2] violates his constitutional protection against double jeopardy. We affirm the judgment of the trial court.

Our Supreme Court, in its opinion addressing the defendant's direct appeal, recited the following procedural history and facts relevant to this appeal. "The defendant . . . was charged with aiding and abetting

[1] General Statutes § 53a-101 (a) provides in relevant part: "A person is guilty of burglary in the first degree when . . . (3) such person enters or remains unlawfully in a dwelling at night with intent to commit a crime therein."

[2] General Statutes § 53a-100aa (a) provides in relevant part: "A person is guilty of home invasion when such person enters or remains unlawfully in a dwelling, while a person other than a participant in the crime is actually present in such dwelling, with intent to commit a crime therein, and, in the course of committing the offense: (1) Acting either alone or with one or more persons, such person or another participant in the crime commits or attempts to commit a felony against the person of another person other than a participant in the crime who is actually present in such dwelling . . . ."

[*849] murder in violation of General Statutes §§ 53a-8 and 53a-54a, felony murder in violation of General Statutes § 53a-54c, home invasion in violation of General Statutes § 53a-100aa (a) (1), and burglary in the first degree **[***4]** in violation of General Statutes § 53a-101 (a) (3). The defendant elected a trial to a three judge court (panel). See General Statutes § 54-82. The panel, consisting of *Cremins, Crawford* and *Schuman, Js.*, rendered a unanimous verdict of guilty on all of the charges except aiding and abetting murder, on which a majority of the panel found the defendant guilty, and thereafter rendered judgment in accordance with the verdict and imposed a total effective sentence of sixty years imprisonment. . . .

"[The victim] James Caffrey lived in the second floor apartment of 323 Hill Street in Waterbury with his girlfriend Samantha Bright and one other roommate. James' mother, Emilia Caffrey, lived in the first floor apartment. In the late afternoon of Saturday, October 26, 2008 . . . Caffrey and Bright had five visitors, including Tamarius Maner, in their living room. Maner had a clear view of the bedroom from where he was seated in the living room. Maner purchased a small amount of marijuana from . . . Caffrey and paid him some money, which Caffrey put in the bedroom. Caffrey kept the marijuana in the bedroom. Caffrey remarked that he had saved $500 for a child that he was expecting with Bright.

"At about that time, Maner and the defendant lived next door **[***5]** to each in other in Bridgeport and had done drug business together. Maner contacted the defendant by cell phone during the evening of Saturday, October 26. Shortly after midnight on Sunday, October 27, Maner and the defendant drove from Bridgeport to Waterbury to go to James Caffrey's apartment. They were carrying loaded handguns.

[*850] "Just after 1 a.m., the doorbell to the second floor apartment at 323 Hill Street rang and Caffrey answered the door. A conversation of a few seconds with . . . Caffrey ensued. Maner then shot Caffrey in the face from a distance of one to three feet with a .45 caliber handgun. Caffrey fell in the hallway in a pool of blood and died from the gunshot wound to the head.

"Maner and the defendant walked past Caffrey and into the bedroom. Then the defendant put a gun to Bright's head and asked: 'Where is everything?' Bright understood the question to inquire about money and drugs. Bright referred them to the top dresser drawer. Maner opened it **[**52]** and threw its contents on the bedroom floor.

"At about that time, they heard the screams of Emilia Caffrey, who had heard the shot and discovered her son lying in the second floor hallway. The defendant told Bright to keep her **[***6]** head down and face the wall. Maner and the defendant then ran into the kitchen, which Emilia Caffrey had also entered to call 911. Maner, who was standing at the stove, fired one shot at [Emilia] Caffrey and missed. The defendant was standing at the window.

"Maner and the defendant then ran out of the kitchen, pushing [Emilia] Caffrey to the floor as they left. They returned to their car and arrived back in Bridgeport around 2 a.m.

"Police interviews of some of the Waterbury visitors to James Caffrey's apartment on the afternoon of October 26 led to the identity of Maner, who was also known in Bridgeport as T or Trigger. Further police investigation, including analysis of Maner's cell phone calls, brought police to an apartment in Bridgeport where they found the defendant. The defendant voluntarily returned to Waterbury with the police and told them that he had not left Bridgeport on the night in question. **[*851]** When confronted with the fact that his cell phone records showed him in Waterbury during the time of the crimes, the defendant put his head down for a minute and then indicated that he had nothing more to say. A search, pursuant to a warrant, of his apartment in Bridgeport revealed **[***7]** a suitcase containing the defendant's clothes, a loaded .45 caliber pistol, and a sock containing sixty-one rounds of ammunition." (Internal quotation marks omitted.) *State v. Bennett*, 307 Conn. 758, 760-63, 59 A.3d 221 (2013). Our Supreme Court vacated the defendant's conviction of aiding and abetting murder and affirmed the judgment in all other aspects. Id., 777.

On November 16, 2015, the defendant filed a pro se motion to correct an illegal sentence pursuant to Practice Book § 43-22,[3] arguing that his sentence for both burglary in the first degree and home invasion violates his constitutional protection against double jeopardy. The defendant subsequently was appointed counsel, who filed a memorandum of law in support of the defendant's motion. After a hearing, the trial court

[3] Practice Book § 43-22 provides that "[t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner."

orally denied the motion. This appeal followed.

We begin by setting forth the standard of review and relevant law. ***HN1***[] "Ordinarily, a claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is reviewed pursuant to the abuse of discretion standard. . . . A double jeopardy claim, however, presents a question of law, over which our review is plenary." (Citations omitted; internal quotation marks omitted.) *State v. Baker*, 168 Conn. App. 19, 24, 145 A.3d 955, cert. denied, 323 Conn. 932, 150 A.3d 232 (2016).

"The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall **[*852]** any person be **[***8]** subject for the same offense to be twice put in jeopardy of life or limb. The double jeopardy clause is applicable to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial. . . .

[53]** ***HN2***[] "Double jeopardy analysis in the context of a single trial is a two-step process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met." (Internal quotation marks omitted.) *State v. Schovanec*, 326 Conn. 310, 325, 163 A.3d 581 (2017). If we determine that the charges do not arise from the same act or transaction, we do not need to proceed to the second step of the analysis. Id., 328.

"At step one, it is not uncommon that we look to the evidence at trial and to the state's theory of the case . . . in addition to the information against the defendant, as amplified by the bill of particulars. . . . ***HN3***[] If it is determined that the charges arise out of the same act or transaction, then the court proceeds to step two, where it must be determined whether the charged crimes are the same offense. . . . At this second step, **[***9]** we [t]raditionally . . . have applied the *Blockburger* test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . . In applying the *Blockburger* test, we look only to the information and bill of particulars-as opposed to the evidence presented at trial-to determine what constitutes a lesser included offense of the offense charged." (Citations omitted; internal **[*853]** quotation marks omitted.) *State v. Porter*, 328 Conn. 648, 662, 182 A.3d 625 (2018). This test is "a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial." Id., 656.

In the present case, we begin our analysis by determining whether the conviction for burglary in the first degree and home invasion arose from the same act or transaction.[4] ***HN4***[] "The same transaction . . . may constitute separate and distinct crimes where it is susceptible of separation into parts, each of which constitutes **[***10]** a completed offense. . . . [T]he test is not whether the *criminal intent* is one and the same and inspiring the whole transaction, but whether *separate acts* have been committed with the requisite criminal intent and are such as are made punishable by the [statute]." (Emphasis added; internal quotation marks omitted.) *State v. Tweedy*, 219 Conn. 489, 497-98, 594 A.2d 906 (1991). When determining whether two charges arose from the same act or transaction, our Supreme Court has asked whether a jury reasonably could have found separate factual basis for each offense charged. *State v. Schovanec*, supra, 326 Conn. 329; see also *State v. Snook*, 210 Conn. 244, 265, 555 A.2d 390, cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989). Logically, it follows that we must ask whether the three judge panel reasonably could have found separate factual bases for the burglary and home invasion charges.

The defendant argues that the home invasion was part of the same transaction as the burglary and that his intent throughout the transaction was to carry out a larceny. We agree that the commission of the burglary did not cease until the defendant left the dwelling. See *White v. Commissioner of Correction*, 170 Conn. App. 415, 434, **[*854]** 154 A.3d 1054 (2017) **[**54]** (burglary, once commenced, continues until all participants in burglary have left the premises). Nevertheless, although the defendant's conduct constituted one transaction and the defendant may have had the intent to commit **[***11]** a larceny throughout the transaction, the relevant inquiry does not focus on the defendant's intent. Rather, we must determine whether the transaction is susceptible to separation into

[4] We note that the defendant did not seek a bill of particulars to aid in our analysis.

parts that support a conviction of both burglary in the first degree and home invasion. We conclude that the acts are susceptible to separation into parts.

The information alleges that the defendant committed burglary in the first degree when he "entered and remained unlawfully in a dwelling at night with the intent to commit a crime therein, namely *a larceny*." (Emphasis added.) The information further alleges that the defendant committed home invasion when he "entered and remained unlawfully in a dwelling, while a person other than the participant in the crime [was] actually present in such dwelling, with the intent to commit a crime therein, here, a larceny, and, in the course of committing the offense, acting with one or more persons, such person or another participant in the crime commit[ted] . . . a felony, here, *a robbery* against the person of Samantha Bright, who was not a participant in the crime who was actually present in such dwelling." (Emphasis added.)

As the charges are presented in the information, **[***12]** the panel could have reasonably found a factual basis to support the burglary charge when the defendant unlawfully entered Caffrey's home at night with the intent of committing a larceny by stealing Caffrey's drugs and money. Additionally, the panel reasonably could have found a factual basis to support the home invasion charge when, subsequent to the unlawful entry, the defendant pointed a gun at Bright's head while asking **[*855]** "where is everything?" The threatened use of physical force during the commission of the larceny gave rise to the felonious act of robbery and, therefore, completed the offense of home invasion.[5] In other words, the burglary charge arose from the distinct and separate act of *entering* the dwelling at night with the intent to commit a larceny, while the home invasion charge arose from the separate act of *threatening the use of physical force* against Bright after the defendant and Maner entered the home and were committing the larceny. See *State v. Meadows*, 185 Conn. App. 287, 295, 197 A.3d 464 (transaction giving rise to conviction of prohibited contact with victim and threatening and harassing victim in violation of standing criminal protective order constituted separate acts because conduct described in long form information **[***13]** was susceptible to separation into parts despite close proximity of acts), cert. granted, 330 Conn. 947, 196 A.3d 327 (2018); *State v. James E.*, 154 Conn. App. 795, 833-834, 112 A.3d 791 (2015) (two counts of assault of elderly person considered separate acts or transactions because conduct described in information was susceptible to separation into parts despite victim being shot twice in short period of time), aff'd, 327 Conn. 212, 173 A.3d 380 (2017).

In an attempt to support his argument, the defendant cites to *White v. Commissioner* ***[**55]*** *of Correction*, supra, 170 Conn. App. 433-34, seemingly for the proposition that when a burglary is in progress, actions taken after entry into a home may be considered as part of an uninterrupted course of conduct in furtherance of the burglary.[6] The relevant portion of our decision in *White* **[*856]** did not address a double jeopardy argument, but rather addressed, following our Supreme Court's decision in *State v. Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), whether a defendant's conduct that gave rise to a kidnapping conviction was incidental to the commission of a burglary.[7] Id., 433. We disagree, therefore, with the defendant's analogy.

Framed differently, the defendant essentially argues that the home invasion, specifically the robbery that gave rise to the home invasion, was incidental to the completion of the larceny that gave rise to the burglary charge. Our court rejected **[***14]** a similar claim in *State v. Gemmell*, 151 Conn. App. 590, 603-604, 94 A.3d 1253, cert. denied, 314 Conn. 915, 100 A.3d 405 (2014), in which the defendant argued that, according to

---

[5] Robbery is defined in General Statutes § 53a-133, which provides in relevant part: "A person commits robbery when, in the *course of committing a larceny* he uses or threatens the immediate use of physical force upon another person for the purpose of . . . compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny." (Emphasis added.)

[6] The defendant argues in his reply brief that one of the state's arguments in the present case is analogous to one of its arguments in *White*, in which it argued that the commission of the burglary was completed upon entry into the home and, therefore, any actions subsequent to the burglary were not incidental to the burglary. Although the state's brief in the present case does state that the burglary was completed upon entry into the dwelling, the state also acknowledged that the burglary continued as long as the defendant and Maner remained in the dwelling. By use of the word "completed," the state appears to mean that liability for burglary attached upon entry into the dwelling.

[7] In *Salamon*, our Supreme Court reexamined this state's kidnapping statutes in holding that a defendant could not be convicted of kidnapping if restraint of a victim was merely incidental in the commission of a separate offense. See *State v. Salamon*, supra, 287 Conn. 509.

Salamon, his conviction of home invasion was incidental to the charges of violation of a protective order or unlawful restraint. In rejecting the defendant's claim, the court noted that *Salamon* was applicable only to the state's kidnapping statutes, and not to other crimes. Id. We similarly reject the defendant's claim in the present case.

In conclusion, the burglary in the first degree and home invasion charges arose from a transaction that was susceptible to separation into parts. Accordingly, the defendant's conviction of both offenses did not violate **[*857]** his constitutional protection against double jeopardy. Because we conclude that the charges arose from separate acts, we need not move to the second step of our double jeopardy analysis.

The judgment is affirmed.

In this opinion the other judges concurred.

End of Document

CERTIFICATE OF COMPLIANCE

I, Steven M. Greenbaum, do hereby certify pursuant to Mass. R. App. P. 16(k), that I have complied with the Rules of Court that pertain to the filing of briefs as set forth in Rules 16(a)(13), 16(e), 18, 20, and 21 of the Massachusetts Rules of Appellate Procedure. This brief contains 4,583 non-excludable words in Times New Roman 14 pt. proportionally spaced type. Microsoft Word Version 2010 was used to prepare this brief.

Signed under the pains and penalties of perjury this 2nd day of June 2020.

/s/ Steven M. Greenbaum
Steven M. Greenbaum
Special Assistant District Attorney

CERTIFICATE OF SERVICE

I, Steven M. Greenbaum, Assistant District Attorney for the Berkshire District, do hereby certify that on this day I served one copy of the Commonwealth's Brief, Record Appendix, and this Certificate of Service upon S. Anders Smith, Esq. (anders@saslawoffice.com) via the Massachusetts Odyssey e-filing system.

Signed under the pains and penalties of perjury this 2nd day of June 2020.

/s/ Steven M. Greenbaum
Steven M. Greenbaum
Special Assistant District Attorney